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Original citation:
Wakefield, Jill. (2017) The common fisheries policy : an exercise in marine exploitation. Yearbook of European Law, 36 . pp. 496-521. ISSN

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This is a pre-copyedited, author-produced version of an article accepted for publication in Yearbook of European Law following peer review. The version of record Jill Wakefield; The Common Fisheries Policy: An Exercise in Marine Exploitation, Yearbook of European Law, Volume 36, 1 January 2017, Pages 496–521, https://doi.org/10.1093/yel/yex011 is available online at: https://doi.org/10.1093/yel/yex011

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The Common Fisheries Policy: An exercise in marine exploitation

Introduction

The seas and oceans cover 71 per cent of the surface of the earth but, beyond the horizon, are largely unobserved. Marine areas provide 17 per cent of the global population's protein intake, and over 3 billion people with 20 percent of their protein. Following population growth, the oceans are expected to make significant contribution to food security for over 9 billion people by 2050.[1] Aside from nutrition, the seas deliver many other ecosystem benefits, including climate stabilisation, molecules used in medicine and engineering, the protection of coastlines through ecosystems, such as corals and mangrove, and act as a sink for 90 percent of greenhouse gas emissions. Nevertheless, its vital importance is often overlooked. The Paris Agreement on Climate Change notes only 'the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity', making no further reference to marine areas.[2] On land, trees and plants provide half the earth's primary production, the other half coming from marine ecosystems through 'minute, short-lived microorganisms suspended in the sunlit surface layer of the oceans'.[3] This production sustains the life of all other organisms in the marine environment, including fish, hence the importance of protecting the integrity of marine ecosystems. It is troubling then that the whole North East Atlantic area is categorised as in overall decline following historic peaks in catching in the middle of the last century.[4]

Under the EU's Common Fisheries Policy, ecosystem protection through ecosystem-based management is secondary to the primary objective of sustainable exploitation of the resource, which applies the internationally recognised precautionary approach. So far the commercial exploitation of fisheries, an industry privileged and protected under the EU Treaties, has operated to prevent ecosystem protection and has operated in contravention of the EU's commitment to sustainable development. The Commission has characterised the overexploitation of the EU fish resource as a 'tragedy of the commons' but the problem is better understood as a market failure in which those licensed to access the public resource for commercial exploitation do not pay for the stocks extracted and are not required to ensure their regeneration. While regulation has sought to contain fishing activity within sustainable bounds, successive reforms have not managed the restoration of stocks to the abundance of the early 20th century or even the years prior to the adoption of the Common Fisheries Policy.

The TFEU obliges the integration of environmental protection into the definition and implementation of all Union policies and activities. In 2013, the EU adopted the seventh of

[1] FAO State of World Fisheries 2016, 2-4

[2] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), recital 13, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

[3] P. Mladenov, *Marine Biology: A Very Short Introduction*, (Oxford University Press, Oxford, 2013), 19

[4] FAO, The State of World Fisheries and Aquaculture 2016: Contributing to food security and nutrition for all, (Rome, 2016), 39 and 42; J. Hutchings and J. Reynolds, 'Marine Fish Population Collapses: Consequences for Recovery and Extinction Risk', BioScience 54(2004), 297-309

its Environmental Action Plans, entitled 'Living well, within the limits of our planet'.[5] Ecosystems in EU marine waters are described as under severe pressure from the intense exploitation of economic opportunities across diverse sectors, from the traditional activities of fishing and shipping to newer and emerging industries including aquaculture, offshore energy, marine biotechnology and deep-sea mining. Despite a substantial body of EU legislation dealing with issues ranging across water resources, waste water, pollutants, air quality, as well as the environmental legislation for the protection of nature, birds, habitats and marine areas, the Union's natural capital in its biodiversity, including marine ecosystems, continues to be lost and degraded. Seeking to rebalance trade and commercial policies within the bounds of the ability of the natural environment to endure, the Environmental Action Plan (EAP) counsels Member States that 'care needs to be taken' to ensure the exploitation of resources 'is compatible with the conservation and sustainable management of marine and coastal ecosystems'.[6] Priority objectives are set out to include the protection, conservation and enhancement of the Union's natural capital as well the improvement of environmental integration and policy coherence.[7] The EAP notes that progress towards 'good environmental status' for EU marine areas by 2020 is being impeded, and at the top of the list of reasons for this is persistent overfishing.[8] This article considers how the Common Fisheries Policy obstructs the broader objectives of EU environmental protection and sustainability that the citizens of Europe deserve.

The Common Fisheries Policy

Under the terms of the TEU, the limits of Union competence are governed by the principle of conferral.[9] The Union has exclusive competence over 'the conservation of marine biological resources under the common fisheries policy' but shares competence with the Member States over all other aspects of fisheries policy as well as over environmental protection.[10] Fisheries share a title in the TFEU alongside agriculture, and find their rationale in provisions retained from the founding Treaty of Rome. The primary objective of current Common Fisheries Policy (CFP) are to increase productivity through technical progress and the optimum utilisation of labour, while ensuring a fair standard of living for those engaged in the sector, stabilising markets and securing the availability of supplies at reasonable prices for consumers.[11] In the post-war era, ensuring food security was of immediate concern to Europe which explains the priority given to productivity and consumer protection in the founding Treaty. At that stage, other than knowledge of the vulnerability of fish stocks to overexploitation, the marine environment was insufficiently well

[5] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' Text with EEA relevance, OJ 2013 L354/171
[6] 7th Environmental Action Plan, Recital 21
[7] 7th Environmental Action Plan, Article 2(1)(a) and (g)
[8] 7th Environmental Action Plan, Recitals 17-19
[9] Article 5 TEU
[10] Articles 3 and 4 TFEU
[11] Now, Title III, Agriculture and Fisheries, Articles 38-44 TFEU

understood to give marine environmental and ecosystem protection adequate attention. Meanwhile, the sustainability of fish stocks was assumed so that regulation aimed at maximising extraction, making overexploitation and biological collapse an inherent risk within regulation.

Since the early days of the EU, knowledge and information has improved and the risk to the sustainability of the living natural resource in EU waters is recognised. However, there has been no amendment of the Treaty in the light of this better understanding or harmonisation of fishing regulation to coalesce with environmental protection required of agriculture or other commercial sectors. The result has been an unrelenting decline in stocks and ecosystems. In 2011 the Court of Auditors concluded the EU fleet was too big for the available resource which leads to overexploitation through illegal, unreported and unregulated fishing.[12] Whilst this is so, there is no recognition that the CFP itself causes overfishing by setting exploitation rates at levels higher than recommended by scientific advice. Instead, a system of Byzantium complexity has evolved and, as noted by the Court of Auditors, the multiplicity of legislation makes the monitoring and control of fishing activity difficult.

The foundations of the CFP were laid down in 1970 but the policy was not fully formulated until 1983.[13] The scope of the CFP is limited within the 12nm territorial zone but has exclusive application in the exclusive economic zones (EEZs) of the Member States and in those areas of the high seas where the EU has negotiated international agreement. Collectively, for the purpose of fisheries, the Member State EEZs are treated as EU waters. These waters operate as a common property or pool resource with a fish quota allocation by the EU to each Member State, which is distributed by them to fishing operators through a restricted access regime, usually by licencing. Although the exploitation of the resource is subject to detailed regulation, the benefit stream from the fish resource accrues to the fishing interests holding the quota share, in effect vesting them with property rights. These shares confer rights of access and appropriation subject to obligations to observe use rules, rights to participate in decision-making and rights of alienation.

In its 2011 reform proposals for the CFP, the Commission envisaged environmental sustainability as being the immediate objective of the policy, even describing the conservation of marine biological resources as the fundamental pillar to achieve the objectives of the CFP.[14] Following delays caused in part by disagreement over the substantive content of the new policy and in part by disagreement between the European Parliament and Council over competence and legal base in decision-making, in 2014, a new

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[12] European Court of Auditors, Special Report No 12/2011, 'Have EU measures contributed to adapting the capacity of the fishing fleets to available fishing opportunities?', (Luxembourg, 2011), pursuant to Article 287(4)(2) TFEU (Special Report No 12/2011). This was previously examined in Special report No 3/93 concerning the implementation of the measures for the restructuring, modernization and adaptation of the capacities of fishing fleets in the Community together with the Commission's replies, [1993] OJ C2

[13] [13] Regulation (EEC) No 2141/70 of the Council laying down a common structural policy for the fishing industry, [1970] OJ Spec Ed 703, repealed and replaced; Council Regulation (EEC) No 170/83 establishing a Community system for the conservation and management of fishery resources, [1983] OJ L24/1, repealed

[14] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy*, COM (2011) 425 final, (Proposed Fisheries Regulation), Explanatory Memorandum, 7

governing Regulation came into force, generally known as the Basic or Fisheries Regulation. This intends securing the restoration of fish stocks to sustainability and their maintenance in at a level that will ensure availability into the future.[15] The objectives of the reformed CFP are stipulated as being to 'ensure fishing and aquaculture are environmentally sustainable in the long-term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies'.[16] Operation of the policy is to be according to particular principles governing fishing activity which are not found elsewhere in EU law.

Sustainable Exploitation

The first and most basic principle of fisheries policy is the principle of sustainable exploitation. This is not defined in the Fisheries Regulation but is included in the Part III Title: 'Measures for the conservation and sustainable exploitation of marine biological resources'. Despite the title, this part of the regulation provides no elaboration of sustainable exploitation and all provisions are presented as being for the purpose of conservation. In a discussion of fisheries management, it has been suggested that conservation is directed at the sustained use of fisheries resources and that conservation measures are those that place restrictions on extraction.[17] Sustained use may be understood as 'doing things that can be continued over long periods without unacceptable consequences, or without unacceptable risks of unacceptable consequences'.[18] Sustainability has 'at least four separate but related objectives'.[19] These are: intergeneration equity in the use of natural resources; a standard for the exploitation of natural resources; equitable use taking account of other states and peoples; the integration of environmental considerations in economic plans while environmental needs are considered in applying environmental objectives.[20] Under the 1982 Law of the Sea Convention fishing activity is to be constrained so that it does not exceed maximum sustainable yield, a standard for exploitation that has been adopted in EU fisheries regulation.[21]

Maximum sustainable yield is defined as meaning 'the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average

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[15] Regulation (EU) No 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, [2013] OJ L354/22 (2013 Fisheries Regulation), in force 1st January 2014

[16] Regulation 1380/2013, Article 2(1)

[17] T. Markus, *European Fisheries Law: From Promotion to Management*, (Europa Law Publishing, Groningen, 2009), 65

[18] G. Heal, 'Markets and Sustainability', in R. Revesz, P. Sands and R. Stewart, *Environmental Law, the Economy, and Sustainable Development,* (Cambridge University Press, Cambridge, 2000), 410-427, 410

[19] P. Sands, Environmental Protection in the Twenty-first Century: Sustainable Development and International Law', in R. Revesz, P. Sands and R. Stewart, *Environmental Law, the Economy, and Sustainable Development,* (Cambridge University Press, Cambridge, 2000), 369-409, 374

[20] Ibid.

[21] *1982 United Nations Convention on the Law of the Sea (LOSC)* (Montego Bay, 10 December 1982, 1833 UNTS 3) (UNCLOS), Article 61(3)

environmental conditions without significantly affecting the reproduction process'.[22] Accordingly, to achieve the objectives of the CFP, the Union is to adopt conservation measures such as multiannual plans to restore and maintain stocks above maximum sustainable yield (MSY). To do this, the Fisheries Regulation is to set targets for exploitation that minimise the impact of fishing on the marine environment. Highly prescriptive measures for setting catch targets are detailed so that regulation will move from the traditional annual total allowable catch permissions to multiannual plans. Whether these apply to single or multiple species, they are to comply with the principles and objectives for the restoration and maintenance of fish stocks above MSY.[23] Specific indicators are provided in 'conservation reference points', which incorporate the precautionary reference points management scheme provided in the international Fish Stocks Agreement.[24] The application of these limits is intended to ensure objectives such as 'an acceptable level of biological risk or a desired level of yield'.[25] Member States are required to reduce the capacity of their fishing fleets, provide economic or fishing opportunity incentives to promote less damaging capture methods and measures that aid the landing obligation.[26] As MSY has not been achieved, the Union may establish stock recovery areas, especially where there are heavy concentrations of fish below minimum conservation reference size or the area is a spawning ground.[27]

The entire thrust of the provisions in this part of the Regulation seeks to constrain the extraction activity of the fisheries sector to enable the restoration of stocks so that the resource has the time and space to regenerate. However, with measures for the conservation and sustainable exploitation of the living resource directed at sustained use they and are not designed to ensure the protection of the ecosystem on which the targeted fish depend. With conservation established as constraint mechanisms on excessive extractive activity, exploitation provisions are dealt with rather briefly in two sections of the Regulation concerning the allocation of fishing entitlements. Such allocations are adopted by the EU in accordance with the second principle of fisheries policy, the principle of relative stability.[28]

Relative Stability

[22] Regulation 1380/2013, Article 4(7)
[23] Regulation 1380/2013, Articles 9-10
[24] 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA) (New York, 4 December 1995, 2167 UNTS 3), Annex II; Agreement on the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, OJ 1998 L189/16; Regulation 1380/2013, Articles 4(16) and (17)
[25] Regulation 1380/2013, Articles 4(16)
[26] Regulation 1380/2013, Article 7
[27] Regulation 1380/2013, Article 8(1)
[28] Regulation 1380/2013, Articles 16-17

Relative stability is a concept peculiar to the CFP and has been given legal traction as a principle of law by the Court of Justice.[29] Although the principle is not defined, its meaning is set out in the recitals of the Fisheries Regulation. The 'precarious state of the fishing industry and the dependence of certain coastal communities on fishing' make it necessary to divide fishing opportunities between Member States 'based on a predictable share of the stocks for each Member State'.[30] Giving substance to this arrangement for determining Member State shares in stocks, the Regulation makes reference to the original 1976 instrument establishing the CFP which adopted the principle. This had observed that the 'temporary biological situation of stocks' makes it necessary to safeguard the interests of communities that are particularly dependent on fishing activities, and has provided the rationale for allocations ever since.[31] Thus, according to the reasoning of the original CFP, the availability of fish stocks could not be guaranteed making it appropriate to protect those most economically vulnerable, identified as those living in coastal communities whose existence was predicated on fishing activity. These communities were recognised as having few alternatives for employment and were to be protected through a guaranteed fish share. Nevertheless, with diminishing fish stocks, increasingly sophisticated technology replacing fishing crew, and consolidation of the fleet, the protection of traditional fishing communities has not proved possible. As a result, coastal communities are to be supported in diversifying their economies and creating jobs in sectors other than fishing.[32] Now, the historic rights of catch entrenched in fisheries regulation as a result of the principle of relative stability accrue to investors in the industry, who, at the same time acquire legitimate expectations in allocations of catch share.

Although the historic connection between coastal communities and the variable fish stocks on which they depend has been broken, the principle of relative stability has been manipulated to support Member State claims to fishing opportunity share. As well as maintaining fish share, it is relevant where new species come to be regulated. In making the allocation of previously unregulated stocks, the Union institutions are dependent on catch data submitted by the Member States. In a case decided by the Court of Justice in 2017, Spain had applied for annulment of a Council regulation setting out fishing opportunities for roundnose and roughhead grenadier fish, alleging allocations breached the principle of relative stability.[33] Checking Member State assessments of catches of the roundnose and roughhead grenadier species was hampered in that the two fish are indistinguishable once caught and processed. However, scientific advice given to the Union suggested that Spain had misreported its catches of both species. Evidence was that Spain had claimed higher catches of roughhead and had under-reported catches of roundnose by including that catch

[29] Joined Cases C-61/96, C-132/97, C-45/98, C-81/00 and C-22/01 *Spain v Council* [2002] ECR I-3439, paragraph 38

[30] Regulation 1380/2013, Recital 35

[31] Regulation 1380/2013, Recital 36; Council resolution on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977, OJ (1981) C 105/1

[32] Regulation (EU) No 508/2014 of the European Parliament and of the Council on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, [2014] OJ L149/1, Article 63

[33] Case C-128/15, *Spain v Council*, judgment of 11 January 2017

in its roughhead calculation. This skewing of catch information by Spain risked a substantial impact on the effectiveness of the TAC established for the roundnose stock. So the reality was that spurious historic catch evidence was submitted to satisfy a specious principle of social protection. In response, the Council had adopted a joint TAC for both species but the issue would be revisited. Once statistical evidence on the state of stocks had been substantiated and prior catch levels verified, allocations would be made applying the principle of relative stability.[34]

In considering Spain's application, the Court of Justice confirmed its previous case law on the principle of relative stability, offering no critical analysis of an outmoded principle of allocation. The Court reiterated its usual observation that the principle operates to ensure each Member State an equitable share of the established TAC determined on the basis of catches traditionally taken by Member States prior to the establishment of the quota scheme, taking account of the local populations especially dependent on fisheries and fishery related industries.[35] Turning to the claim of share made by Spain, the Court noted that, had the Council accepted the accuracy of Spain's reported catches of roughhead grenadier evidencing historic catch and based its allocations of the TAC on this information, it would have created 'a lasting advantage' for Spain.[36] Furthermore, such recognition would establish a legitimate expectation of future allocations of fish share in the same proportion. The principle of relative stability crystallises fishing entitlements in all future allocation of a regulated stock.

Without a genuine coastal connection, the retention of the principle of relative stability is unjustifiable. According to the Fisheries Regulation, fishing activity is to be environmentally sustainable delivering economic, social, employment and food benefits.[37] Not all outcomes will be possible so a balancing of these sustainability factors has to be made when determining fishing opportunities. The principle of relative stability is invoked as a social factor to support the economic imperative for the maximisation of fishing activity, meaning that the environmental factor of sustainability, which may be reflected in scientific advice recommending reduced or low extraction levels, will be overridden. Once the principle of relative stability has been applied to create a legitimate interest in the maintenance of proportionate shares in the total allowable catch, there will be enormous pressure from the industry to maintain catch levels; a smaller total allowable catch leads to smaller proportional shares to Member States and subsequently to its industry. Application of the principle of relative stability has not fulfilled its original objective of protecting vulnerable fishing communities. Its retention perpetrates a societal fiction, impeding the achievement of sustainable fisheries and the Court ought to reassess its interpretation.

<u>The Precautionary Approach</u>

[34] Ibid.
[35] Paragraph 57 citing, Case C-3/87 *Agegate*, [1989] ECR 4459, paragraph 24
[36] Paragraph 60
[37] Regulation (EU) No 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy, OJ L354/22 (2013 Fisheries Regulation), Article 2(1)

The third principle of fishing is the precautionary approach which was adopted from the UN Fish Stocks Agreement (FSA) and is defined in the CFP as 'an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment'.[38] Under the Fisheries Regulation, the principle is stated to be derived from the precautionary principle as set out in the Treaty, which stipulates that environmental protection must be integrated into the definition and implementation of other Community policies.[39] The precautionary principle has been recognised as a general principle of EU law and has been given explication by the Commission, so that it is to be applied 'specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community'.[40]

The Court of Justice has defined the scope of the precautionary principle to encompass all matters concerned with human health and consumer safety across all EU activity.[41] Precaution operates with regard to human health because, in the event of the risk occurring, there is a 'likelihood of real harm to public health...the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective.'[42] However, the principle does not extend to the protection of the environment except where this has implications for public health.[43] As the risk to human health is the perquisite for the application of the precautionary principle, it has not been extended to fisheries policy. Where the precautionary principle has been sought to be relied upon with regard to the CFP, the Court has been careful to rule in terms of the legislation and point out that the CFP requires the precautionary approach rather than the precautionary principle.[44]

There is a clear distinction between the approach and the principle. While the precautionary principle requires legally-binding decisions err on the side of caution to take account of uncertainty as to whether damage will be occasioned and whether the risk to human health is acceptable, the precautionary approach to fisheries requires demonstration of certainty that damage will be caused before fishing activity will be restricted. As a result, while the precautionary principle operates to exclude the risk of damage, the precautionary approach incorporates risk of overexploitation and stock depletion which may or may not be recoverable.[45] Maintaining fish stocks at the margins of biological sustainability is accepted practice within regulation and prevents robust programmes for the regeneration and rebuilding of stocks. The precautionary approach has never been effective to secure fish stock sustainability but instead entrenches a pattern of overexploitation. There has been a

[38] Regulation 1380/2013, Article 4(8)
[39] Regulation 1380/2013, Recital 10; Article 191(2) TFEU
[40] Communication from the Commission on the precautionary principle, COM (2000) 1 final, 3
[41] Joined Cases T-74, 76, 83-85, 132, 137, 141/00, *Artegodan GmbH and Others v Commission,* [2002] ECR II-4945, paragraph 183
[42] Case C-343/09 *Afton Chemical Limited* [2010] ECR I-7027, paragraph 61; Case C-333/08 *Commission* v *France* [2010] ECR I-757*,* paragraph 93 and case-law cited therein.
[43] Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63
[44] Case C-453/08 *Karanikolas and Others*, [2010] ECR I-7895, paragraph 45
[45] R. Froese and A. Proelß, 'Rebuilding fish stocks no later than 2015: will Europe meet the deadline?' Fish and Fisheries, 11(2010), 194-202, 199

steady decline in stocks throughout the course of the CFP. The total catch in 2013 was 15.8% less than 10 years earlier and 37.1% lower than in 1995.[46]

Although the precautionary approach is the standard of both international and EU fishery instruments, there has been no attempt to set the parameters of the precautionary approach to incorporate sustainability. However, according to a group of eminent marine and fisheries scientists and economists, the lack of definition for the approach is readily rectified by the adoption of three regulatory rules. First, fishing mortality should not exceed the natural rate of mortality. Second, population sizes should be maintained above half the stocks natural abundance. Third, fish should be allowed to grow and reproduce by adjusting the size at which fish may be caught.[47] This would effect a shift from 'the current approach of maximum acceptable ecological impact to the principal of minimizing of impact'. While it is conceded this would force 'a major conceptual change' the authors assert it 'would achieve some of the goals of ecosystem-based fisheries management, such as rebuilding biomass of prey and predator species and reducing capture of unwanted or threatened species and of collateral damage to the ecosystem'.[48] By inference, the incorporation of these rules in determining fish catch would integrate an ecosystem-based approach into fisheries management.

The ecosystem-based approach in EU marine areas

Concerned at the intensification of commercial activities in marine areas leading to deterioration of the environment and creating conflict over use, in the mid-2000s it was decided that the fragmentary, sectoral management of marine areas would be replaced by an integrated cross-sectoral approach to combat the serious impacts of human activity. This would facilitate effective action to tackle 'climate change, the degradation of the marine environment, and the lack of sustainability in resource exploitation.' [49] Under the new Integrated Maritime Policy (IMP), the abatement of environmental damage was the objective and this was to be achieved though the attainment of 'good environmental status' for EU waters by 2020.[50] Integrated management across sectors was to adopt decision-making that would be informed by principles of subsidiarity, competitiveness, stakeholder participation and it would adopt the ecosystem approach. The objectives of the integrated policy were to be rooted in the EU's agenda for the creation of jobs and economic growth. However, the IMP contained little that would address the regulation of fishing, although the Commission stated it would ensure the CFP would reflect the ecosystem-based approach. [51]

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[46] Eurostat, 'Statistics Explained: Fishery Statistics' Section 1.2: 'http://ec.europa.eu/eurostat/statistics-explained/index.php/Fishery_statistics#Catches

[47] R. Froese, H. Winker, D. Gascuel, U. Rashid Sumaila and D. Pauly, 'Minimizing the impact fishing', Fish and Fisheries, 17(2016), 785-802

[48] Ibid.

[49] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union, COM (2007) 575 final, 1

[50] See the Marine Strategy Framework Directive, below.

[51] COM (2007) 575 final, Section 4.1

The Marine Strategy Framework Directive (MSFD) was adopted in 2008, constituting the environmental pillar of the IMP.[52] An ecosystem-based approach is to be adopted with regard to the management of human activities while at the same time 'enabling the sustainable use of marine goods and services'. Rather than a balancing between the socio-economic demands on living marine resources and protection of the environment, the intention is that 'priority should be given to achieving or maintaining good environmental status in the marine environment, to continuing its protection and preservation, and to preventing its subsequent deterioration'.[53] While the ecosystem-based approach is intended to ensure that the collective pressure of human activities on the environment is kept within levels compatible with the achievement of good environmental status by 2020, it is also recognised this may not be possible in all marine waters.[54]

Environmental protection is a competence shared between the EU and the Member States. Achieving good environmental status for waters within the EU area is the duty of the Member States. Individually, Member States are each responsible for addressing environmental degradation in their waters but are to act jointly with other Member States to adopt mutually agreed performance standards to redress damage.[55] EU waters have been divided into European Marine Regions according to geographical and environmental criteria. Within each marine region, each Member State belonging to that region must develop strategies for their marine waters, and then act in cooperation with other Member States and any non-EU countries with interests in the particular area in the management of the area. Member States are to produce development plans which, in conjunction with the assessments of other States in the same region, will define 'good environmental status' and enable clear environmental targets and monitoring programmes to be established.[56] Establishing good environmental status requires that steps are taken to secure fully functioning marine ecosystems in all their constituent parts. In that way, marine areas will be able to maintain their resilience to human-induced environmental change so that the 'human-induced decline of biodiversity is prevented'.[57]

Eleven qualitative descriptors are set out in the MSFD ranging across the whole spectrum of biological diversity. These signifiers of good environmental status address all environmental aspects: the maintenance of species and habitats; the identification of safe levels on invasive species; the maintenance of healthy fish stocks; the maintenance of the components of the foodweb; the integrity of the seafloor to ensure the functioning of ecosystems; and further descriptors concern eutrophication, contaminants, litter and

[52] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), [2008] OJ L164
[53] Ibid. recital 8
[54] ibid. recital 29
[55] B. Eberlein and D. Kerwer, *'New Governance in the European Union: A Theoretical Perspective'*, (2004) 42 Journal of Common Market Studies 121-142
[56] Commission Decision 2010/477/EU on criteria and methodological standards on good environmental status of marine waters, [2010] OJ L232/14, Recital 6; Marine Strategy Framework Directive, Articles 8-12
[57] Marine Strategy Framework Directive, Article 5(a)

energy.[58] The intention is that through the maintenance of standards established for each aspect of the environment, good environmental status as a whole can be achieved. Healthy fish stocks will be evidenced in populations of all commercially exploited fish and shellfish maintained within safe biological limits with each population exhibiting an age and size distribution indicative of a healthy stock.[59] To hold fish within safe biological limits, stocks must not be overfished.

In accordance with the MSFD, Member States are required to report to the Commission on steps taken to implement the directive. Current information from the European Environment Agency shows that progress towards achieving good environmental status has been poor. An exception has been for reported fish stocks which have increasingly good environmental status with regard to the MSFD criteria of fishing mortality and reproductive capacity the further north their location.[60] However Member States have failed to reach agreement on how the MSFD descriptors for good environmental status should be measured and met. Without common standards, no consistent and coherent strategy has been established. Reviewing the information submitted to the Commission as required under the terms of the Directive, the Commission found that UK measures are only partially adequate to achieve good environmental status. Measures adopted by the other major fishing countries, Denmark, Spain, France and the Netherlands are based on inadequate definitions of good environmental status so that effective targets have not been established. With divergent understanding of, and approaches to, good environmental status it followed that no conclusions as to the efficacy of approaches by the Commission could be drawn and comparisons between Member States' performances were impossible.[61]

The Ecosystem-based approach under the Common Fisheries Policy

Despite the environmental descriptors in the MSFD, fisheries are not subject to its direction and the MSFD notes that fisheries will continue to be regulated exclusively through the CFP.[62] As the Fisheries Regulation stipulates, 'the CFP shall implement the ecosystem-based approach to fisheries management' to minimise the adverse effects of fishing activities on the marine ecosystem and ensure the degradation of the marine environment is avoided. The expectation is that marine fishing activity will operate to support the objective of good

[58] Marine Strategy Framework Directive, Annex 1

[59] Marine Strategy Framework Directive, Annex 1, Qualitative descriptors for determining good environmental status, paragraph (3)

[60] European Environment Agency, Status of marine fish stocks, last modified September 2015, available at: http://www.eea.europa.eu/data-and-maps/indicators/status-of-marine-fish-stocks-2/assessment/#status-of-marine-fish-stocks

[61] Commission Staff Working Document**,** Annex Accompanying the document Commission Report to the Council and the European Parliament The first phase of implementation of the Marine Strategy Framework Directive (2008/56/EC) - The European Commission's assessment and guidance, SWD **(**2014) 49 final, 28-29. Member States are required to implement monitoring programmes to assess status, but these have been found to be inadequate: Commission Report to the Council and the European Parliament assessing Member States' monitoring programmes under the Marine Strategy Framework Directive, COM/2017/3 final

[62] Marine Strategy Framework Directive, Recital 39

environmental status for the seas.[63] Under the CFP, the ecosystem approach is to be adopted in multiannual plans and most important stocks are now managed through such plans.[64] However, huge complexity is indicated in applying the approach. Account is to be taken of 'fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties regarding biotic, abiotic and human components of ecosystems'.[65] Unsurprisingly, exactly how this is to be done is not elaborated but there are steps that may be taken which may be seen as giving effect to an ecosystem approach.

To facilitate fisheries policy to incorporate environmental protection in management, the Fisheries Regulation provides for the adoption of specific measures to comply with EU environmental legislation, some of which are within Union institutional competence and others which are available to the Member States. The Union may adopt stock recovery areas in areas of biological sensitivity, and the Commission may be empowered to do so under the terms of multiannual plans. However, the Commission is reliant on Member State advice for the effectiveness of such areas because they are to identify recovery areas that may form part of a coherent network.[66] Member States may adopt conservation measures to comply with EU environmental legislation contained in the MSFD, which provides for spatial protection measures that will contribute 'to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystem, such as special areas of conservation pursuant to the Habitats Directive, special protection areas to the Birds Directive, and marine protected areas' agreed either by the EU or Member States in international or regional agreements that will build the Natura 2000 network.[67] The Wild Birds Directives requires Member States establish Special Protection Areas and the Habitats Directive requires Member States to provide habitat protection for endangered species, flora and fauna special areas of conservation. However, the conflict between environmental protection and commercial entitlements to fish under the CFP is scarcely mitigated. Measures adopted by a Member State must not interfere with the fishing activities of fishing vessels of other Member States and must be compatible with CFP objectives.[68] The only exception to the prohibition on unilateral Member State action is in case of emergency where there is a serious threat to the marine biological resources or ecosystem. In such situation, the Member State is required to consult with the Commission and Member States who will be affected by the restriction as well as relevant Advisory Councils before a measure is adopted. Even then, the Commission may intervene to require the Member State to repeal such measures.[69]

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[63] 2013 Fisheries Regulation, Article 2(3)
[64]2013 Fisheries Regulation, Article 9(4) and (5)
[65] Regulation (EU) 1380/2013, Article 4(1)(9)
[66] Regulation (EU) 1380/2013, Article 8
[67] Regulation 1380/2013, Article 11(1), citing: Directive 2008/56/EC, MSFD Article 13(4), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L206/7; Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ 1979 L103/1
[68] ibid.
[69] 2013 Fisheries Regulation, Article 13

While the powers of the Member States are limited, the Commission is empowered to adopt restrictive measures for environmental protection that will apply to all vessels.[70] Either at the request of a Member State or on its own initiative, the Commission may adopt measures to limit, restrict or stop fishing activity in the event of urgency relating to a serious threat to the conservation of marine biological resources or marine ecosystem.[71] Such threat, whatever its cause, is to be capable of displacing fishing activity for a maximum period of six months although this may be renewed for a further six months.[72] To be valid, the serious threat must be 'on duly justified imperative grounds of urgency' which means that it must be sufficiently certain as to require immediate action. Any intervention to suspend fishing activity on precautionary grounds of scientific uncertainty would be unlawful.

Regionalisation and conservation

If Member States could agree a programme of environmental protection for a marine areas, it should be possible to make it effective. Following the 2013 CFP reform, a new mode of regionalised management promised to be the most significant reform since the inception of the CFP as it applies conservation measures to relevant geographical areas, particularly for fish stocks managed under a multiannual plan.[73] Regionalisation is organised by sea basin so that Member States having a direct interest in a fishery may reach a consensus and submit proposals for conservation legislation to the Commission which will adopt the measure by Commission Act.[74] This merging of Union responsibility for the conservation of stocks under the CFP with the responsibility of Member States for environmental protection is intended to produce a more coherent and effective system that will be capable of delivering sustainability in fish stocks and good environmental status for seas. However, there are significant impediments to achieving the anticipated consistency.

Conservation measures proposed under the CFP must be referred to the relevant Advisory Council prior to submission to the Commission for adoption.[75] The intention is that decision-making will, according to the subsidiarity principle, be made closer to participants in the industry and will find more support among those to be affected. According to the principles of good governance laid down in the Fisheries Regulation, reference to the Advisory Councils will ensure appropriate involvement of stakeholders at all stages of decision-making, from conception to implementation.[76] As a result it extends to all conservation measures, including emergency measures adopted by the Commission or Member State in the event of a serious threat to marine biological resources.[77] The allocation of seats in the Advisory Councils is 60% to the fishing industry and 40% to all other stakeholders. Thus, the

[70] 2013 Fisheries Regulation, Article 11(2)
[71] Regulation 1380/2013, Article 12
[72] 2013 Fisheries Regulation, Article 12-13
[73] 2013 Fisheries Regulation, Article 18
[74] 2013 Fisheries Regulation, Article 46
[75] 2013 Fisheries Regulation, Article 6(2)
[76] 2013 Fisheries Regulation, Article 3(f)
[77] 2013 Fisheries Regulation, Articles 12 and 13

industry dominates the advice that will be provided by the Advisory Councils to the Commission on proposed measures.

The main instrument for conservation under the CFP is the multiannual plan the objective of which is to restore and maintain fish stocks above MSY.[78] Multiannual plans have been in place for some years for most important exploited stocks. These are intended to manage fish stocks either by setting fishing mortality levels or setting targets for stock size with the intention of fishing at MSY by a deadline. Safeguards are to be imposed for remedial action as necessary with review to ensure that MSY is achieved and maintained. The highly contested discard ban is to be implemented in accordance with the Fisheries Regulation which sets out those stocks that are subject to the landing obligation. In addition, where they are able to reach unanimous agreement on species not specified in the Regulation, Member States may recommend the institution of landing obligations.[79] Further conservation measures that may be adopted under the regionalisation provisions are the establishment of stock recovery areas and any other measure that is necessary in order to comply with EU environmental law. Where Member States wish to adopt conservation measures to meet EU environmental law obligations, these must be demonstrated as being made on 'best available scientific advice', suggesting the evidence would have to be very persuasive to displace fishing activity.[80]

The first of these new sea basin plans under the reformed CFP has been proposed by the Commission for the North Sea to deal with demersal fish stocks, which are those that live and feed near the bottom of the sea.[81] It is to establish the framework for regionalisation in the area. In its explanation of the proposal the Commission deals with competence noting that: 'Provisions of the proposal relate to the conservation of marine biological resources, measures that fall under the exclusive competence of the Union. Consequently the subsidiarity principle does not apply.'[82] Thus, not a conservation measure necessary for compliance with obligations under environmental legislation or to respond to a serious biological threat. The plan is more accurately described as a plan for sustainable exploitation.

The proposals closely follow the strictures of the Fisheries Regulation. Objectives contained in the proposal are for: the restoration and maintenance of harvested species above MSY, a contribution to the elimination of discards, and the implementation of the ecosystem-based approach to fisheries management. Under the last, the negative impacts of fishing on the marine ecosystem are to be minimised. Measures adopted under the plan are to be taken in accordance with best available scientific advice.[83] They are to be coherent with environmental legislation and the objective of achieving good environmental status by

[78] 2013 Fisheries Regulation, Articles 9 and 10
[79] 2013 Fisheries Regulation, Article 15(3)
[80] Article 18(5)
[81] Proposal for a Regulation of the European Parliament and of the Council on establishing a multi-annual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks and repealing Council Regulation (EC) 676/2007 and Council Regulation (EC) 1342/2008 COM/2016/0493 final - 2016/0238 (COD)
[82] Ibid. 5
[83] Ibid. Article 3

2020. Nevertheless, the Commission explains the plan is designed to overcome the effects of the discard ban in mixed fisheries which 'could lead to under-utilisation of quota in the North Sea mixed fisheries' and 'might have negative economic and social consequences for the fishing industry in the coming years'.[84]

The issue of under-utilisation of quota concerns the objections to the discard ban. Once fully implemented, the Fisheries Regulation makes the discard of any catches in excess of quota illegal. This means that in mixed fisheries vessels will have to stop fishing once the quota for any one stock is reached so preventing the vessel fishing for other quota. The purpose of the plan is to reduce the risk of underfishing, while implementing the MSY catch standard and establishing biomass limits to implement the precautionary approach. However, to avoid under-utilisation the plan incorporates over-utilisation which is to be redressed through biomass safeguard measures that are 'to give a framework restore stocks when they fall below safe biological limits'.[85] Once a stock is outside safe biological limits, it is at risk of collapse and impaired recruitment. The plan incorporates this risk as acceptable.[86]

It seems extraordinary that a measure can be described as being consistent with the ecosystem approach to fisheries management while at the same time acknowledging that regulation under the plan will lead to fishing beyond sustainable limits so risking stock sustainability. Despite reforms and the attempt to shift the basis of fishing to conservation, this plan serves up the same menu of fishing at the margin of sustainability incorporating risk of biological damage and collapse which has been a feature of the precautionary approach in fisheries management under the CFP. To judge from the proposed North Sea multiannual plan, the ecosystem approach is yet to be incorporated into fisheries regulation despite assertions that it is. Regulation to facilitate not only the exploitation but also the overexploitation of a resource that is renewable only if given the time and space to regenerate is set to continue. Moreover, its effects will expand as new areas and species become accessible as a result of climate change and the deployment of increasingly sophisticated new capture technologies by the industry.

Conservation measures necessary to comply with environmental legislation

The UN Food and Agriculture Organisation defines deep-sea fisheries as those conducted between the depths of 200 and 2000 metres. In 2002, a measure to regulate deep sea stocks was adopted by the Council.[87] These stocks were described as vulnerable, requiring regulation to limit or reduce fishing opportunity. Data was to be collected, access to stocks controlled by the issue of special fishing permits and additional control measures were to be introduced. Ten years later it was acknowledged that a segment of the EU fishing fleet was

[84] Ibld. 2
[85] Ibid. 2 and Articles 7 and 8
[86] N. de Sadeleer, *Implementing the Precautionary Approach: Approaches from the Nordic Countries, the EU and USA*, (Earthscan, London, 2007), 167-168
[87] Council Regulation 2347/2002 establishing specific access requirements and associated conditions applicable to fishing for deep-sea stocks, OJ 2002 L 351/6, Recitals

dependent on these deep sea species.[88] It was noted that 'deep-sea habitats and ecosystems are largely unknown, but we know that they are home to coral reefs as much as 8,500 years old and ancient species that are still little explored. This is a fragile environment that, once damaged, is unlikely to recover. Highly vulnerable to fishing, deep-sea fish stocks are quick to collapse and slow to recover because they reproduce at low rates'.[89]

The grenadier species, referred to above, is a deep-sea species. Catches for all deep-sea species have been declining for years due to overfishing. Therefore, the Commission proposed new measures to restrict the use of certain fishing gear in the deep-sea, in particular bottom trawls and bottom-set gillnets, and to improve knowledge to aid regulation. For this, the Commission proposed measures requiring the collection of data. To incentivise cooperation from the industry it was suggested that financial support might be made available from EU funds. In contravention of the UN requirement to ban bottom-trawling in deep-sea areas,[90] the EU Economic and Social Committee opined that such ban would be disproportionate,[91] a position endorsed by the European Parliament which deleted the proposed ban on bottom-trawls targeting deep-sea species.[92]

Subsequently, at the end of 2016 a new regulation for deep-sea stocks was adopted.[93] It applies to deep-sea species which are those 'characterised by a combination of the following biological factors: maturation at relatively old ages, slow growth, long life expectancies, low natural mortality rates, intermittent recruitment of successful year classes and spawning that may not occur every year'.[94] Its reach is within EU waters in the North-

[88] European Commission, Fisheries: the Commission tables new measures for better protection for deep-sea stocks and their habitats, Memo/12/586

[89] Ibid.

[90] General Assembly Resolution 61/105, Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, A/RES/61/105 (8 December 2006), available from undocs.org/A/RES/61/105; General Assembly Resolution 64/72, Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, A/RES/64/72 (4 December 2009), available from undocs.org/A/RES/64/72; A. Rogers and M. Gianni, *The Implementation of UNGA Resolutions 61/105 and 67/72 in the Management of Deep-Sea Fisheries on the High Seas*, Report prepared for the Deep-Sea Conservation Coalition, International Programme on the State of the Ocean, (London, United Kingdom, 2010)

[91] Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council establishing specific conditions to fishing for deep-sea stocks in the North-East Atlantic and provisions for fishing in international waters of the North-East Atlantic and repealing Regulation (EC) No 2347/2002', COM(2012) 371 final — 2012/0179 (COD), paragraph 4.3-4.4; FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas, Rome, FAO. 2009.

[92] European Parliament legislative resolution of 10 December 2013 on the 'Proposal for a regulation of the European Parliament and of the Council establishing specific conditions to fishing for deep-sea stocks in the North-East Atlantic and provisions for fishing in international waters of the North-East Atlantic and repealing Regulation (EC) No 2347/2002', COM(2012) 371 final — 2012/0179 (COD), Amendment 7

[93] Regulation (EU) 2016/2336 of the European Parliament and of the Council of 14 December 2016 establishing specific conditions for fishing for deep-sea stocks in the north-east Atlantic and provisions for fishing in international waters of the north-east Atlantic and repealing Council Regulation (EC) No 2347/2002, OJ L354/2016

[94] Regulation (EU) 2016/2336, Article 3(1)

East Atlantic and over EU fishing vessels fishing in international waters regulated by the North-East Atlantic Fisheries Commission and certain areas regulated by the Fishery Committee for the Eastern Central Atlantic.[95] Restrictions on access are supported by technical restrictions on fishing gear with bottom trawls banned only in depths below 800 metres but otherwise permitted, while fishing with bottom-set gillnets is authorised.

The question then arises as to whether it is possible for Member States seeking to adopt measures to comply with environmental protection obligations to act pursuant to the terms of the Fisheries Regulation.[96] The legislation is far from clear and the conflict between the CFP and EU environmental protection legislation is to be considered by the Court of Justice in a preliminary action brought by Deutscher Naturschutzring, a German umbrella organisation for environmental protection, against the Federal Republic of Germany.[97] Questions to the Court concern the proper understanding of Article 11 of the Fisheries Regulation, whereby Member States may adopt environmental protection measures within waters under their sovereignty or jurisdiction provided these do not interfere with fishing vessels of other Member States.[98] The Court is asked whether a Member State may adopt conservation measures to protect the integrity of the seabed in Natura 2000 marine sites by prohibiting the use of fishing equipment and gillnets that touch the seabed, where such prohibition will impact on the fishing activities of vessels of other Member States. Clarification is particularly requested as to: whether the fishing techniques under consideration fall within the concept of 'conservation measures'; the meaning of 'vessels of other Member States', and whether this phrase includes the fishing vessels of another Member State which sail under the German flag; whether adopting conservation measures to promote the objectives listed in the Nature Directives falls within the ambit of the Article 11 provision to 'meet the objectives of the relevant Union legislation'. The Court is also asked to clarify whether Article 11 operates to preclude a Member State from adopting measures to comply with the EU's Environmental Liability Directive.[99] If the Court were to give negative answers to these questions, the Court is asked whether the exclusive competence conferred on the EU by operation of the TFEU for the conservation of marine biological resources under the CFP precludes the adoption of the measures to prohibit the use of the fishing equipment specified.

The questions raised illustrate the obstacle to environmental protection posed by the provisions of the CFP. Despite the case not having been considered, what is certain is the

[95] Regulation (EU) 2016/2336

[96] 2013 Fisheries Regulation, Article 11

[97] Case C-683/16 *Deutscher Naturschutzring, Dachverband der deutschen Natur- und Umweltschutzverbände e.V. v Bundesrepublik Deutschland*, not yet heard

[98] Regulation 1380/2013, Article 11(1) 'Member States are empowered to adopt conservation measures not affecting fishing vessels of other Member States that are applicable to waters under their sovereignty or jurisdiction and that are necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC, Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC, provided that those measures are compatible with the objectives set out in Article 2 of this Regulation, meet the objectives of the relevant Union legislation that they intend to implement, and are at least as stringent as measures under Union law.'

[99] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ 2004 L143/56

Court will not permit any encroachment into the exclusive Union competence for the conservation of fish stocks. Unilateral attempts by Member States to implement measures on environmental protection grounds that will have the effect of restricting fishing activity will be permissible only under the terms set by the CFP which demand reference to the Commission. Unless all Member States having fishing rather than environmental interests in the area are in agreement over the introduction of environmental measures, the Commission is empowered to act only if the proposed measures to comply with the Nature Directives is urgent and conservation is 'in jeopardy'.[100] In such situation, the protective measures may be adopted for twelve months and, where the jeopardising situation persists, may continue for a further twelve months, but both periods are stipulated to be maximums. Thus, in extremis, restrictions on fishing to protect areas significant under the terms of the Nature Directives may be permissible, but the default position of the CFP is to permit fishing activity and ecosystem exploitation. If the Court does give priority to fishing activity it will render almost nugatory the powers of the Member States to implement ecosystem protections where the operation of the CFP may be affected.

The exploitation of species, such as the grenadier, underscores fundamental problems in fisheries regulation. In its design it is neither directed at, nor capable of, protecting the marine environment or responding to the particular problem in the fishing industry's practice of fishing down the marine food web.[101] Spain, in contesting a measure to fix fishing opportunities for deep-sea fish stocks, was either unconcerned about resource and ecosystem sustainability or was in thrall to its fishing industry.[102] Deep-sea stocks only began to be regulated by the EU in 2003,[103] but in doing so the EU sanctioned the exploitation of extremely vulnerable slow-growing, long lived species.[104] If unregulated, the Commission explained, targeting deep-sea stocks will lead to 'a race by fishing undertakings to take possession of a free resource, without having sufficient regard to the sustainable level of exploitation'.[105] Although regulation is deemed 'a necessary public intervention' intending the reduction of 'the impact of fishing activity on the ecosystem and the food web as a consequence of sudden reductions in the size of certain fish populations', EU regulation of other stocks has not led to sustainability. Regulation has avoided the essential problem that, beyond paying a licence fee, the resource is free to appropriators who bear no responsibility either for its regeneration or its maintenance.

Progress towards sustainability?

[100] 2013 Fisheries Regulation, Article 11(4)
[101] D. Pauly et al., 'Fishing Down Marine Food Webs', 279(1998) Science, 860-863
[102] Council Regulation 1367/2014 fixing for 2015 and 2016 the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks, OJ 2014 L 366/1
[103] Council Regulation (EC) No 2347/2002 establishing specific access requirements and associated conditions applicable to fishing for deep-sea stocks, OJ 2002 L 351/ 6
[104] Proposal for a Council Regulation fixing for 2017 and 2018 the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks, COM/2016/0643 final
[105] Ibid. Explanatory Memorandum 1

In order to draft proposals, decisions and policy measures the Commission must be furnished with scientific advice based on the principles of excellence, independence and impartiality, and transparency,[106] applying best practice principles of risk assessment. Scientific committees have been established to advise on matters particular to the various sectors, including the Scientific Committee of the European Environment Agency (SCEEA) which advises on any matter within the competence of the Agency,[107] and the Scientific, Technical and Economic Committee for Fisheries (STECF).[108] The scientific committees are tasked according to legislative provision. In the approximation of laws for the establishment and functioning of the internal market, legislative proposals concerning health, safety, environmental protection and consumer protection, must provide a high level of protection and must take account of any new development based on scientific facts.[109] In order to be able to advise the policy-maker, the scientific committees must make an assessment on how the issue at hand affects human or environmental welfare or the impacts it may have in the future.

In preparing its policy on the environment, the EU must take account of available scientific and technical data, as well as the particular environmental conditions in the various regions of the Union. Specifically, the way in which the data is used must weigh the potential benefits and costs of action or lack of action, together with the economic and social development of the Union as a whole and the balanced development of its regions.[110] As to fisheries policy, the terms of the Fisheries Regulation are peppered with references to scientific advice, a category covering both social and biological sciences. In the recitals and legally-binding provisions, scientific advice is intended to elucidate problems, such as the phenomenon of 'choke species'. Advice is to be provided to ensure good governance, dictate the introduction of the landing obligation, permit the increase in fish catch, inform the EU's negotiating position internationally.[111] If such advice is to be available, reliable and accurate data must be collected and this is a major objective of the CFP.[112] Part V of the Regulation entitled 'Scientific Base for Fisheries Management' sets out administrative requirements regarding data collection, requiring Member States to coordinate their fisheries and aquaculture research and reiterates wide consultation with both science and social science bodies.[113]

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[106] Commission Communication, 'The collection and use of expertise by the Commission: principles and guidelines. Improving the knowledge for better policies', COM(2002) 713 final

[107] Regulation (EC) 401/2009 of the European Parliament and of the Council on the European Environment Agency and the European Environment Information and Observation Network, OJ 2009 L 126/13, Article 10, repealing Council Regulation (EEC) No 1210/90, OJ 1990 L120/1

[108] Commission Decision 2005/629/EC establishing a Scientific, Technical and Economic Committee for Fisheries, OJ 2005 L 225/18

[109] Article 114 TFEU

[110] Article 191(3)TFEU

[111] 2013 Fisheries Regulation, Recitals 8, 14, 27, 32

[112] 2013 Fisheries Regulation, Recital 46, Article 2(4)

[113] 2013 Fisheries Regulation, Article 25

So important is the role of scientific advice that, as a matter of good governance, fisheries measures must be adopted 'in accordance with the best available scientific advice'.[114] However, there is no specific requirement for scientific advice to be used in order to determine any particular aspect of fisheries policy, although there are technical management issues, such as the determination of 'maximum sustainable yield' that seem to demand such expertise. In practice, biological scientific advice, which ought to be determinative of policy, is not necessarily the basis of the measure because the objectives of fisheries policy are socio-economic as much as environmental. Accordingly, scientific evidence is to taken into account along with technical and economic advice in devising conservation and exploitation measures.[115] Given the intention of the Fisheries Regulation to promote sustainable use, it make sense that biological scientific advice would be the basis of decision-making. Instead, scientific bodies are to be consulted, and even the STECF is to be consulted only where appropriate, and such consultation is not to be unfocused, regard being had to 'the proper management of public funds'.[116] Without an effective mechanism to deliver sustainable use, a sustainable marine ecosystem seems unlikely.

Under the CFP, there is no obligation for good environmental status and this omission affects the replenishment of fish stocks for future use. A report of experts in a study set up by the EU's Scientific Technical and Economic Committee for Fisheries (STECF) looked at the long term trend in landings.[117] Yield has declined by more than 50% in recent years as compared with the 1970s in the North Sea, 'which is by far the most important fishing area in Europe', with similar patterns in the Irish Sea, Celtic Sea, Bay of Biscay and Iberian coast. While yields from seas to the west of Scotland and Ireland held up during most of the period, since 2006 yields have halved. Only the Baltic Sea had resisted such declines, but even here landings were lower. Stock abundance based on spawning biomass had increased over much of the period but had declined in recent years while recruitment to stocks 'exhibited a consistently decreasing trend'. The report found that during the past ten years there has been a reduction in fishing pressure and the mean fishing mortality rate of assessed stocks has almost halved in all the ecosystems subject to study but there was no clear recovery in the biomass and ecosystems. Regeneration of stocks was not being achieved which has implications for the effectiveness and social acceptance of fisheries management. The authors conclude that it will be difficult to reach the intended EU MSY target which would mean that the good environmental status sought by the MSFD would also fail to be achieved.[118] This failure affects the perception of abundance. The low level to which stocks have fallen creates a new benchmark for determining stocks' natural abundance from which improvement is measured. Similarly, the state of ecosystems is

[114] 2013 Fisheries Regulation, Article 3(c)
[115] 2013 Fisheries Regulation, Article 6(2) and 26
[116] 2013 Fisheries Regulation, Article 26
[117] D. Gascuel et al., 'Fishing impact and environmental status in European seas: a diagnosis from stock assessments and ecosystem indicators', Fish & Fisheries, 17(1) 2016, 31-55
[118] Ibid. 51

measured from a degraded status and, with the passing of generations of biologists, the memory of more robust and diverse ecosystems is lost.[119]

Future Prospects

Emerging out of the European Union's IMP, the EU developed its Blue Growth agenda, described by the Commission as intending the harnessing of 'the untapped potential of Europe's oceans, seas and coasts for jobs and growth'.[120] The EU's Blue Growth project is conceived as offering 'new and innovative ways to help steer the EU out of its current economic crisis',[121] the Commission 'showing how Europe's coasts, seas and oceans have the potential to be a major source' of prosperity.[122] Although the Commission seeks to increase coordination between marine sectors, the focus of this agenda is on sustainable growth across marine and maritime sectors as a whole. Growth areas include aquaculture which is seen as having the potential to create jobs and wealth,[123] but the most basic of marine activities, marine fishing, has been excluded.

Instead of seeking to confront the system failure of the CFP, the EU is concentrating its effort in gaining access to new fishing grounds. The EU made its first official pronouncement with regard to the Arctic region in 2008. An advisory paper had been issued by the Commission to the European Parliament and Council in response to the emerging concern over climate change. Climate change was characterised as 'a "threats multiplier" [so that] environmental changes are altering the geo-strategic dynamics of the Arctic with potential consequences for international stability and European security interests' necessitating the development of an EU Arctic policy.[124] Three main policy objectives were put forward including the protection and preservation of the Arctic in cooperation with its population and the promotion of the sustainable use of resources. Resource development and exploitation included hydrocarbon, commercial navigation, tourism and fisheries. Fisheries were anticipated to expand as a result of climate change and the EU was concerned to establish a regulatory framework 'before new fishing opportunities arise'.

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[119] D. Pauly, 'Anecdotes and the shifting baseline syndrome of fisheries', Trends in Ecology and Evolution, 10(1995), 430: '…each generation of fisheries scientists accepts as a baseline the stock size and species composition that occurred at the beginning of their careers, and uses this to evaluate changes. When the next generation starts its career, the stocks have further declined, but it is the stocks at that time the serve as a new baseline.'

[120] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Blue Growth opportunities for marine and maritime sustainable growth, COM (2012) 494 final, 2

[121] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Blue Growth opportunities for marine and maritime sustainable growth, COM/2012/494 final, 2

[122] COM (2014) 254 final/2, 2

[123] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Innovation in the Blue Economy: realising the potential of our seas and oceans for jobs and growth, COM (2014) 254 final/2

[124] Communication from the Commission to the European Parliament and the Council - The European Union and the arctic region, COM/2008/763 final

The EU's Arctic Policy is intended to complement the Arctic policies of the Member States and follows closely the Danish policy, which observes that temperature increases in the Arctic and ice melt 'can make new areas of the Arctic potentially attractive for fishing'.[125] Denmark proposes a consolidation of the fleet with investment in new, larger fishing vessels leading to a restructuring that will 'cause an outflow of labour to other industries and make demands on social policy'.[126] Despite asserting a sustainable policy that will protect indigenous populations, the fishing policy makes no provision to protect the artisanal sector and fails to indicate positive measures to ensure the sustainability of traditional fisheries-dependent communities. For its part, the EU lays claim to a role in the determination of the future of the Arctic area, insisting that the legal framework for new regional fisheries management organisation in international Arctic waters must be established in 'an open and inclusive manner', and it 'welcomes the broadening of the negotiations to involve major fishing nations'.[127] Given the decline of fish abundance in the North East Atlantic since the middle of the last century, it is difficult to be optimistic that either this will be reversed or that new, northerly fishing grounds will not follow the same pattern.

The stream of EU initiatives related to the protection of the marine environment is continually undermined by the absolute determination of all economic actors to exploit a free resource. The ideals of the Blue Growth Agenda, at least in relation to marine fisheries, will similarly be trampled by the drive to open new fishing grounds or to further exploit those already fished to exhaustion. If a system giving greater weight to the sustainability of the ecosystem is to be achieved, operators, regulators and governments will have to understand and accept its goals. Regulation alone cannot provide a full solution to the market failure that gives rise to excess capacity and overfishing. Persuading operators of their responsibilities in their use of the common resource would be simplified if they were charged for the fish resource from which their profits derive. The user-pays principle is a general principle of EU law applied to other natural resource sectors and there is nothing to prevent its application to the marine fisheries sector. A system could be devised which captures the additional profit that arises from the existence of a free resource and which currently provides such a powerful driver to the expansion of fleet capacity. Introducing such a system would result in an outcome that was both economically and biologically stable, allowing the resource to recover and the industry to prosper.

Conclusion

Only lip-service is being paid by the EU to rebuilding the abundance of the fish resource so that fishing can become economically sustainable for the long-term. This is short-sighted and is contrary to the EU's sustainable development objectives. The failure to restore stocks to their former abundance is a denial of intergeneration equity. Expansion into new marine areas, either the deep ocean or fisheries beyond EU waters, not only jeopardises sustainability in those areas but also promotes an inequitable use impacting other states

[125] Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011-2020, 31, http://www.uniset.ca/microstates/mss-denmark_en.pdf
[126] Ibid. 31
[127] JOIN(2016) 21 final, 16

and peoples. Maintaining a discrete fisheries policy that prioritises economic activity undermines the EU's commitment to sustainable development and seriously impedes the achievement of good environmental status for the EU's marine areas. The minimum international standard of sustainability through MSY according to the precautionary approach has proved to be inadequate, and the CFP requires no more than coherence with environmental legislation and is not subject to it.

As a regional organisation with a highly developed legal and regulatory system, the EU is in a position to set its own more rigorous and environmentally sustainable model for fisheries. Until the Treaty is amended to include an objective of environmental protection under the Agriculture and Fisheries Title, there will be no obligation on decision-makers to prioritise ecosystem protection over economic activity. It is open to the Court of Justice to review its interpretation of the precautionary approach to fishing activity within EU waters. As the precautionary approach is derived from the precautionary principle, the Court of Justice should apply the principle so that fisheries are managed within the bounds of biological sustainability rather than being regulated on the margin of unsustainability and collapse. Changes to the Treaty or an amended judicial approach could undoubtedly improve the state of EU fisheries, although at the cost of an ever-larger and more unwieldy regulatory burden. A permanent sustainable solution requires a fundamental change in approach.[128] Only when the user pays for the fish resource itself will a truly environmental and economically stable outcome be achieved. Such an outcome is no more than EU citizens deserve. Protecting biodiversity protects human welfare, now and into the future.

[128] J. Wakefield, *Reforming the Common Fisheries Policy*, (Edward Elgar, Cheltenham, 2016)